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No. WD86595

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DR. ANNA FITZ-JAMES,

Respondent,

v.

JOHN R. ASHCROFT,

Appellant.

Appeal from the Circuit Court of Cole County,
The Honorable Jon E. Beetem, Circuit Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction. Mo. Const. art. V, § 3.

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STATEMENT OF FACTS

I. Ballot title procedures.

On March 8, 2023, Dr. Anna Fitz-James submitted eleven initiative petitions and sample sheets to the Secretary of State. D33, at 1. Each would enshrine in the Constitution a "fundamental right to reproductive freedom," which is defined as "the right to make and carry out decisions about all matters relating to reproductive health care." D34, at 2; D35, at 2; D36, at 2; D37 at 2; D38, at 2; D39 at 2. Reproductive health care encompasses "prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions;" however, the list is not exhaustive. *Id*.

On July 26, 2023, the Secretary certified a ballot title—consisting of a summary statement and fiscal note summary—for each measure. D33, at 4; D25. The road to a ballot title consisted of all the usual steps plus a detour to the Supreme Court. On March 29, 2023, the State Auditor prepared a fiscal note and fiscal note summary for each petition and sent those materials to the Attorney General for review. D33, at 3; D42-47. On April 10, 2023, the Attorney General issued opinion letters refusing to approve the fiscal note summaries because he disagreed with the Auditor's assessment. D33, at 3; D50. On April 13, 2023, the Secretary of State prepared a summary statement for each petition and sent those summary statements to the Attorney General for review. D33, at 2; D40. On April 24, 2023, the Attorney General approved the Secretary's summary statement for each petition. D33, at 2; D41.

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Because the Secretary could not certify a ballot title without an approved fiscal note summary, Dr. Fitz-James sued to determine "which state official is authorized to estimate and summarize that fiscal impact" of the initiatives. *State ex rel. Fitz-James v. Bailey*, 670 S.W.3d 1, 7 (Mo. banc 2023). The Supreme Court concluded, "[i]t is the Auditor, and not the Attorney General, who bears this responsibility." *Id.* Thereafter, on July 20, 2023, the Attorney General approved the fiscal note summary. D33, at 2-3; D51. Six days later, the Secretary certified the ballot titles. D33, at 4; D25.

II. This litigation.

Dr. Fitz-James challenged the fairness and adequacy of six of the ballot titles. D2; D78, D87; D96; D105; D114. The circuit court consolidated the six cases, designating the challenges as six counts. D10. Each initiative would revise Article I of the Constitution by adopting a new section known as Article I, Section 36.

A. Count I

In Count I, Dr. Fitz-James contests the summary statement for Initiative 2024-085. The initiative would append to the Constitution the following:

> Section 36. 1. This Section shall be known as "The Right to Reproductive Freedom Initiative."
>
> 2. The Government shall not deny or infringe upon a person's fundamental right to reproductive freedom, which is the right to make and carry out decisions about all matters relating to reproductive health care, including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions.
>
> 3. The right to reproductive freedom shall not be denied, interfered with, delayed, or otherwise restricted unless the Government demonstrates that such action is justified by a compelling governmental interest achieved by the least restrictive means. Any denial, interference, delay, or restriction of

the right to reproductive freedom shall be presumed invalid. For purposes of this Section, a governmental interest is compelling only if it is for the limited purpose and has the limited effect of improving or maintaining the health of a person seeking care, is consistent with widely accepted clinical standards of practice and evidence-based medicine, and does not infringe on that person's autonomous decision-making.

4. Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after Fetal Viability provided that under no circumstance shall the Government deny, burden, or restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical or mental health of the pregnant person.

5. No person shall be penalized, prosecuted, or otherwise subjected to adverse action based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall any person assisting a person in exercising their right to reproductive freedom with that person's consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so.

6. Notwithstanding this Section, the general assembly may enact laws that require a health care professional, before providing an abortion to a minor, obtain consent from a parent or guardian of the minor, provided that such law shall permit the health care professional to provide the abortion without such consent if, in the good faith judgment of a health care professional:

(1) obtaining consent may lead to physical or emotional harm to the minor;

(2) the minor is mature and capable of consenting to an abortion; or

(3) obtaining consent would not be in the best interest of the minor.

7. The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so.

8. Nothing in this Section requires government funding of abortion procedures.

9. If any provision of this Section or the application thereof to anyone or to any circumstance is held invalid, the remainder of those provisions and the application of such provisions to others or other circumstances shall not be affected thereby.

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10. For purposes of this Section, the following terms mean:

(1) "Fetal Viability", the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

(2) "Government",

a. the state of Missouri; or

b. any municipality, city, town, village, township, district, authority, public subdivision or public corporation having the power to tax or regulate, or any portion of two or more such entities within the state of Missouri.

D37, at 2.[1]

The Secretary's summary for Initiative 2024-085 is:

> Do you want to amend the Missouri Constitution to:
>
> - allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
>
> - nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
>
> - allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
>
> - require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

[1] Hereafter, the proposed art. I, §§ 36.4 and 36.10(1) are collectively referred to as the "fetal-viability" clause. Section 36.6 is referred to as the "parental-consent" clause, and § 36.8 is referenced as the "funding" clause.

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D25, at 4.

After a bench trial on stipulated evidence, the trial court found the Secretary's language "argumentative" and that his summary statements "d[id] not fairly describe the purposes or probable effect of the initiative." As a remedy, the court provided a correct summary statement:

> Do you want to amend the Missouri Constitution to:
>
> - establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any government interference of that right presumed invalid;
> - remove Missouri's ban on abortion;
> - allow regulation of reproductive health care to improve or maintain the health of the patient;
> - allow abortion to be restricted or banned after Fetal Viability except to protect life or health of the woman;
> - allow General Assembly to enact a parental consent requirement for abortion with an alternative authorization procedure; and
>
> declare government funding of abortion is not required?

D77, at 4.

B. Count II

In Count II, Dr. Fitz-James alleges the summary statement for Initiative 2024-078 is insufficient and unfair. The text of the amendment is the substantively the same as for Initiative 2024-085, except that it does not include the fetal-viability, parental-consent, or funding clauses. D23, at 4-5.

The Secretary certified a summary statement that states:

> Do you want to amend the Missouri Constitution to:
>
> - allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
>
> - nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
>
> - require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding; and
>
> - prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures?

D25, at 1.

The court's judgment certified a correct summary statement:

> Do you want to amend the Missouri Constitution to:
>
> - establish a right to make decisions about reproductive health care, including abortion and contraceptives, with any government interference of that right presumed invalid;
>
> - remove Missouri's ban on abortion; and
>
> - allow regulation of reproductive health care to improve or maintain the health of the patient?

D77, at 5.

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C. Count III

Dr. Fitz-James disputes the summary statement for Initiative 2024-080 in Count III. Initiative 2024-80 is substantially the same as Initiative 2024-085, except that it excludes the fetal-viability and funding clauses and includes the following:

> Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after 24 weeks of gestation, as measured from the first day of the patient's last menstrual period consistent with accepted clinical standards, provided that under no circumstance shall the Government deny, burden, or otherwise restrict an abortion that, in the good faith judgment of a treating health care professional, is needed to protect the life or physical or mental health of the pregnant person or is of a nonviable pregnancy.

D23, at 7-8 (hereafter the "24-week" clause).

The Secretary summarized the initiative as:

> Do you want to amend the Missouri Constitution to:
>
> - allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
>
> - nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
>
> - allow for laws to be enacted regulating abortion procedures after 24 weeks, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
>
> - require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding.

D25, at 2.

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After finding the Secretary's summary statement insufficient and unfair, the trial court certified a correct summary statement:

> Do you want to amend the Missouri Constitution to:
>
> - establish a right to make decisions about reproductive health care, including abortion and contraceptives, without government interference;
> - remove Missouri's ban on abortion;
> - allow regulation of reproductive health care to improve or maintain the health of the patient;
> - allow abortion to be restricted or banned after 24 weeks except to protect life or health of the woman; and
> - allow General Assembly to enact a parental consent requirement for abortion with an alternative authorization procedure?

D77, at 5.

D. Count IV

Count IV is Dr. Fitz-James's claim that Initiative 2024-082's summary statement is inadequate and unfair. Initiative 2024-082 is like 2024-085, except that it omits the fetal-viability, parental-consent, and funding clauses but includes the 24-week clause. D23, at 10-11.

The Secretary's summary statement was:

> Do you want to amend the Missouri Constitution to:
>
> - allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;

- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;

- allow for laws to be enacted regulating abortion procedures after 24 weeks, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and

- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

D25, at 3.

After trial, the court certified this correct summary statement:

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, without government interference;

- remove Missouri's ban on abortion;

- allow regulation of reproductive health care to improve or maintain the health of the patient; and

- allow abortion to be restricted or banned after 24 weeks except to protect life or health of the woman?

D77, at 6.

E. Count V

In Count V, Dr. Fitz-James assented that she was entitled to a different summary statement for Initiative 2024-086. Initiative 2024-086 is the same in substance of 2024-085, but for its exclusion of the parental-consent and funding clauses. D23, at 13-14.

The Secretary summarized Initiative 2024-086 as:

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Do you want to amend the Missouri Constitution to:

- allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;

- nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;

- allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and

- require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

The trial court's judgment certified the following correct summary statement:

Do you want to amend the Missouri Constitution to:

- establish a right to make decisions about reproductive health care, including abortion and contraceptives, without government interference;

- remove Missouri's ban on abortion;

- allow regulation of reproductive health care to improve or maintain the health of the patient; and

- allow abortion to be restricted or banned after Fetal Viability except to protect life or health of the woman?

D77, at 6.

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F. Count VI

Finally, for Count VI, Dr. Fitz-James questions the sufficiency and fairness of the Secretary's statement summarizing Initiative 2024-087. Initiative 2024-087 is materially the same as Initiative 2024-085; however, it does not include the parental-consent clause. D23, at 15-16.

The Secretary wrote the following as his summary statement:

> Do you want to amend the Missouri Constitution to:
>
> - allow for dangerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice;
>
> - nullify longstanding Missouri law protecting the right to life, including but not limited to partial-birth abortion;
>
> - allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman, including a minor, to end the life of their unborn child at any time; and
>
> - require the government not to discriminate against persons providing or obtaining an abortion, potentially including tax-payer funding?

D25, at 6.

The trial court certified this corrected summary statement to:

> Do you want to amend the Missouri Constitution to:
>
> - establish a right to make decisions about reproductive health care, including abortion and contraceptives, without government interference;
>
> - remove Missouri's ban on abortion;

- allow regulation of reproductive health care to improve or maintain the health of the patient;

- allow abortion to be restricted or banned after Fetal Viability except to protect life or health of the woman; and

- declare government funding of abortion is not required?

D77, at 7.

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ARGUMENT

I. Voters are entitled to a summary statement that is neutral and fairly describes the purpose and probable effects of the initiatives and does not deploy argumentative language. (Responds to Points I-VII)

Dr. Fitz-James challenged summary statements prepared for six iterations of her proposed Right to Reproductive Freedom Initiative. Each version of the initiative she submitted serves the purpose of restoring and returning to individuals the right to make and carry out decisions about their own reproductive health care without excessive government interference while permitting regulation of the right in some circumstances.

A neutral summary statement safeguards the right of initiative enshrined in the Missouri Constitution. For every initiative, the Secretary must prepare a statement that does not exceed one hundred words summarizing the initiative. § 116.334, RSMo. The summary must "be in the form of a question using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." *Id*. Thus, "[i]t [wa]s incumbent upon the Secretary . . . to promote an informed decision of the probable effect of the proposed amendment[s]." *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008). To do so, he was required to use "language [that] fairly and impartially summarizes the purposes of the measure[s]." *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999).

Instead, the Secretary concocted summary statements that were filled with bombastic, argumentative language that misstated the purposes and probable effects of

the proposals.[2] Section 116.190 provides a remedy against statements that could hinder efforts to secure a majority by "inadequately and with bias, prejudice, deception and/or favoritism" misleading voters about the consequences of the initiatives. *Hill v. Ashcroft*, 526 S.W.3d 299, 308 (Mo. App. W.D. 2017) (quoting *State ex rel. Humane Soc'y of Mo. v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010)); *see Union Elec. Co. v. Kirkpatrick,* 678 S.W.2d 402, 405 (Mo. banc 1984) (ballot title must "fairly and impartially summarize[] . . . purposes of the measure, so that the voters will not be deceived or misled"); *Missourians Against Hum. Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006). A summary statement is "intended to provide voters with enough information that they are made aware of the subject and purpose of the initiative and allow the voter to make an informed decision as to whether to investigate the initiative further." *Hill*, 526 S.W.3d at 308.

The decision of whether to adopt one of Dr. Fitz-James' plans belongs to the voters. "To avoid encroachment on the people's constitutional authority, courts will not sit in judgment on the wisdom or folly of the initiative proposal presented[.]" *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. banc 2012). Here, the trial court had to intervene to ensure voters would not be misled and prejudiced. *See United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000) ("Before the people vote on an initiative, courts may consider only those threshold issues that affect the integrity of the election itself.").

[2] Throughout this brief, the use of "argumentative" in reference to the Secretary's language is intended to encompass biased and prejudicial language as well.

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The trial court found several phrases were argumentative or did not fairly describe the purposes or probable effects of the initiatives. These included: "dangerous, unregulated, and unrestricted abortions," "from conception to live birth," "without requiring a medical license," "without . . . potentially being subject to medical malpractice," "nullify longstanding Missouri law," "the right to life," "partial-birth abortion," "including a minor," "end the life," "unborn child," "at any time" "potentially including tax-payer funding," and "prohibit any municipality, city, town, village, district, authority, public subdivision, or public corporation having the power to tax or regulate or the state of Missouri from regulating abortion procedures." D77, at 2-3.

Upon finding the Secretary's summaries to be insufficient and unfair, the trial court was "authorized to do no more than certify a correct ballot title." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 829 (Mo. banc 1990). Thus, the trial court produced a correct summary statement for each initiative.

On appeal, the Secretary focuses almost exclusively on the claimed probable effects of the initiatives. He says nothing about the *purpose* of the measures, nor does he real challenge the notion that his language is argumentative—apart from a conclusion that one phrase "certainly cannot be partial." App. Br., at 64. Yet, although the Secretary has made no effort to challenge Dr. Fitz-James's stated purpose, his summary statements assert that her purpose is really that no regulation would be permitted.

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II. "[D]angerous, unregulated, and unrestricted abortions, from conception to live birth, without requiring a medical license or potentially being subject to malpractice" is not a purpose or probable effect of the initiatives because they allow regulations and restrictions of any reproductive health care, including abortion, needed to improve or maintain the health of the patient and all but one allows additional regulation and restriction of abortion so stating otherwise is argumentative, misleading, and likely to confuse voters. (Responds to Points I, II, III, V)

The Secretary's first bullet point, which is common to each of his six summary statements, is a Russian-doll-like syllogism premised on a series of false assumptions. The nesting dolls are inaccurate contentions, including that: (1) a presumption of invalidity means a regulation is invalid, (2) heightened review is fatal, (3) the limit on restrictions that interfere with autonomous decision making means the language allowing regulation of reproductive health care needed to maintain or improve patient health is verbiage, (4) a required exception when needed for the life or health of the patient makes the language allowing restrictions after twenty-four weeks or fetal viability meaningless, (5) the inability to prosecute those who aid others in obtaining reproductive health care for themselves means that all language allowing regulation is superfluous, and (6) something that is potential is probable. The first bullet point is also argumentative, as evidenced by the lengthy literal arguments the Secretary undertakes to try to justify it.

The Secretary's first bullet point runs headlong into the fact that abortion is not dangerous. *See Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 78 (1976) ("the [abortion procedure] most commonly used nationally by physicians after the first trimester . . . is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth"); Tr. 24 (citing D59, at 5 and comparing risk

factor for abortion—2 percent—and hip replacement surgery—4 percent—and maintaining pregnancy through childbirth—8 percent)).

Nonetheless, regulation of reproductive health care, including abortion, is permitted if it is needed to maintain or improve the health of the patient. Moreover, under five of the six initiatives, additional restriction on abortion is allowed even if it is not necessary to protect patient health. The Secretary cannot erase this central purpose of the measures. *See Shoemyer v. Missouri Sec'y of State*, 464 S.W.3d 171, 175 (Mo. banc 2015) (per curiam) ("[N]o constitutional right is so broad as to prohibit all regulation").

A. The presumption of invalidity does not mean that any regulation is invalid.

The Secretary assumes that all abortion regulations will be invalid upon adoption of the initiative; the trial court corrected the summary statement to provide they are *presumed* invalid. There is a difference.

Under the initiatives, if the constitutionality of a law infringing on the ability to make and carry out decisions about reproductive health care, including abortion, is questioned, the usual burden shifts. *See Pearson v. Koster*, 367 S.W.3d 36, 45 (Mo. banc 2012) ("The purpose behind stating that statutes are 'presumed' constitutional is . . . to allocate the burden of proof to the plaintiff for its claim that a statute is unconstitutional"). In garden-variety constitutional challenges, a statute is presumed valid, and the challenger has the burden to show it is not. *See, e.g.*, *No Bans on Choice v. Ashcroft*, 638 S.W.3d 484, 489 (Mo. banc 2022); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006).

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Yet, the presumption of *un*constitutionality is no stranger to constitutional law. *See, e.g.*, *Fox v. State*, 640 S.W.3d 744, 750 (Mo. banc 2022) ("Laws that regulate speech based on its communicative content are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests") (internal quotation marks and citation omitted).

A presumption comes at the start of the analysis; it does not dictate the conclusion. Some litigants fail to overcome the presumption of constitutionality. *See, e.g.*, *Gurley v. Missouri Bd. of Priv. Investigator Examiners*, 361 S.W.3d 406, 411 (Mo. banc 2012). On the other hand, other litigants do surmount it. *See, e.g.*, *No Bans on Choice*, 638 S.W.3d at 492. The Secretary assumes that regulations and restrictions governing reproductive health care will be unenforceable instantly upon passage of an initiative, but that is not how these things work. Respondent is not aware of an example of the state halting enforcement of a law, absent a court order, because it is unconstitutional, and the Secretary provides none. On the contrary, the state defends its statutes in court even when their unconstitutionality is indisputable. *See, e.g.*, *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1153 (8th Cir. 2014) (defending Missouri's flag desecration statute against First Amendment claim).

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B. Heightened review is not fatal.

The Secretary has fallen for the "popular myth in American constitutional law . . . that the 'strict scrutiny' standard of review applied to enforce rights such as free speech and equal protection is strict in theory and fatal in fact." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 794 (2006) (citation omitted). Winkler's analysis shows that in federal courts, "[s]trict scrutiny is not, generally speaking, fatal in fact, and there are clear patterns in the cases that show how context influences judicial review." *Id.*, at 870. Indeed, "30 percent of all applications of strict scrutiny—nearly one in three—result in the challenged law being upheld." *Id.*, at 796.

Strict scrutiny review is not fatal in Missouri courts either. "[T]hat strict scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying the standard." *State v. Merritt*, 467 S.W.3d 808, 813-14 (Mo. banc 2015) (internal quotation marks and citation omitted). For instance, Missouri's "'restriction on the possession of weapons by felons survives even the most stringent formulation of the strict scrutiny standard.'" *Alpert v. State*, 543 S.W.3d 589, 600 (Mo. banc 2018) (quoting *State v. Clay*, 481 S.W.3d 531, 535 (Mo. banc 2016)). So, too, does Missouri's sexually violent predator statute. *In re Care & Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007).

To be sure, the initiatives would require the state to show a regulation of reproductive health care, including abortion, is necessary to maintain or improve the

patient's health.[3] The requirement is born from the history of restrictions on abortion that, in reality, provide no health benefit. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311—12 (2016) (describing findings that admitting-privileges requirements have no health benefit); § 188.037, RSMo. (requiring admitting privileges); § 188.080, RSMo. (creating crime for not having admitting privileges); *see also*, § 188.027(4), RSMo. (requiring medically contraindicated intra-vaginal ultrasound).

C. The limit on restrictions that interfere with autonomous decision making makes superfluous the language allowing regulation of reproductive health care needed to maintain patient health.

At the core of the Secretary's defense of his summary statements is his tenuous claim that the requirement that no restriction interfere with autonomous decision making renders any authority to regulate reproductive health care meaningless. To accept his argument, this Court would have to construe the meaning of "interfere with autonomous decision making" out of context and discard the customary rules of statutory construction.

Application of the rules of statutory construction belies the Secretary's the rules of statutory construction belie the Secretary's postulation. As a general matter, "[c]onstitutional provisions are subject to the same rules of construction as statutes." *Brown v. Morris*, 290 S.W.2d 160, 167 (Mo. banc 1956). "The primary rule is to give effect to the intent of the voters who adopted the provision by considering the plain and ordinary meaning of the words used." *Pearson v. Koster*, 367 S.W.3d 36, 48 (Mo. banc

[3] Most versions of the initiative allow a freer hand to regulate after fetal viability or twenty-four weeks' gestation. *See* § II.D., infra.

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2012) (internal quotation marks and citation omitted). "Interpretation is 'not to be hyper-technical, but instead is to be reasonable [and] logical.'" *Sarcoxie Nursery Cultivation Ctr., LLC v. Williams*, 649 S.W.3d 127, 134 (Mo. App. W.D. 2022) (quoting *Gash v. Lafayette Cnty.*, 245 S.W.3d 229, 232 (Mo. banc 2008)). Moreover, "a particular . . . phrase cannot be read in isolation." *Gash*, 245 S.W. 3d at 232. "Instead, the provisions of a [constitutional amendment] are construed together and read in harmony with the entire [amendment]." *Id*. (internal quotation marks and citation omitted). Furthermore, courts "assume[] that every word in the constitutional provision has effect and meaning." *Pearson*, 367 S.W.3d at 48.

Considered in context, the plain language of the initiatives is clear that the provision requiring any government interest to "not infringe on [a] person's autonomous decision-making" to be compelling is related to the right to make decisions, not the right to carry them out. The right to reproductive freedom is defined as "the right to make and carry out decisions about all matters relating to reproductive health care." *See, e.g.*, D37, at 2.[4] The right, nonetheless, may be regulated when "justified by a compelling government interest achieved by the least restrictive means." *Id*. A compelling government interest must, amongst other things, such as benefitting the person and being consistent with the standard of care, "not infringe on th[e] person's autonomous decision-making." As a whole, this language commands that any interest in restricting reproductive health care not interfere with a person's autonomy to "make . . . decisions"

[4] The relevant language is the same for each iteration of the initiative.

related to reproductive health care—leaving open to restriction the ability to "carry out decisions" for patient-health reasons. A limitation of the government's ability to interfere with decision making logically applies to the ability to make decisions. Such a limitation is necessary in the face of statutes such as § 188.027.1(2), RSMo., which requires a patient be supplied with medically inaccurate information as a part of obtaining informed consent for an abortion. If the amendment intended to say a regulation could not interfere with autonomous decision making *and carrying out of decisions*, it would have said so. It is not probable that a court will add language to the text when construing the initiatives.

In addition to the plain language, the Secretary fumbles into refuting his own interpretation. He does so by proclaiming—on repeat—that requiring a regulation to not interfere with autonomous decision-making means that there could be no restrictions, using as examples health-and-safety regulations. The Secretary's point that the state would be impotent to protect the health of patients would have validity were he correctly interpreting the initiatives. However, his interpretation would make meaningless the authority provided by the government in the same subsection to regulate reproductive health care for the purpose of "improving or maintaining the health of the person seeking care." Constitutional provisions are not construed in a manner where one phrase causes other parts of the provisions to be superfluous. *See Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993) (stating presumption that "every word, clause, sentence, and provision" is intended to "have effect" and that statutes do not include "verbiage or superfluous language").

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D. The required exception when needed for the life or health of the patient does not make the language allowing restrictions after twenty-four weeks or fetal viability meaningless.

On top of the restriction permissible for all reproductive health care, most of the proposed measures allow additional regulation of abortion. Yet, the Secretary insists, this authority is also meaningless. Thus, he surmises, abortion must be allowed "from conception to live birth."

Five of the initiatives provide that "the general assembly may enact laws that regulate the provision of abortion after" either fetal viability or twenty-four weeks' gestation, so long as there is an exception for the life or health of the patient. Initiatives 2024-085, 2024-086, and 2024-087 include the fetal-viability clause; Initiatives 2024-080 and 2024-082 have the 24-week clause. This means that abortion could be restricted without satisfying heightened scrutiny—so long as abortion is still available when needed for patient health.

The Secretary suggests that the life-and-health "exception swallows the rule," App. Br., at 38, but that, of course, would cause the rest of the subsection allowing restrictions to have no meaning. That is not how constitutional provisions are interpreted. *See* § II.C., supra.

The Secretary also plays fast and loose with the facts. He accurately quotes the exception's language—when "needed to protect the life or physical or mental health of the pregnant person"—but for the rest of the argument, he pretends it is enough that abortion care "might" improve some aspect of health or "would have a medical benefit" and that there is "no minimum threshold at all for health benefits or risks." App. Br.,

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38—40. Words are giving their plain meeting. The initiatives require that abortion be "needed." "Needed" means to "be necessary." *Need*, New Oxford American Dictionary (3d ed. 2010). The Secretary's rhetoric is at odds with the initiatives' language.

By ignoring that the assessment of need must be made in good faith, the Secretary spouts absurdities. He claims to believe that "simply asking a dermatologist to say that abortion might clear up acne would be a permission slip for abortion through all nine months of pregnancy." App. Br., 39. Yet, he fails to mention that the exception is available only if "in the good faith judgment of a treating health care professional [it] is needed." D37, at 2. He provides no evidence that the good-faith-judgment requirement is not a sufficient safeguard against his predicted outcomes. Indeed, it is a comparable safeguard to the standard for determining a medical emergency in the statute the Secretary cites— "based on reasonable medical judgment," § 188.015(7), RSMo.—and identical to the definition in § 188.039.1, RSMo.—"good faith clinical judgment."

E. The inability to prosecute those who aid others in obtaining reproductive health care for themselves does not mean that all language allowing regulation is superfluous.

This Court should reject the Secretary's suggestion that it is probable the initiative's prohibition on penalizing those "*assisting* another in exercising their right to reproductive freedom . . . *for doing so*," D37, at 2 (emphasis added), would preclude any health or safety regulations whatsoever. True, the provision would rule out adverse action against one person from helping another person effectuate their right to reproductive freedom. At no point would it constrain the state from promulgating rules needed to maintain or improve the health of patients.

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This provision is not about proscribing prosecutions for providing abortions. While it is currently a Class B felony to "perform[] or induce[] an abortion" in Missouri, § 188.017.1, RSMo., this provision about aid would not be needed to challenge any prosecution. The government could no more comply with the right to reproductive freedom while criminalizing all abortions than it could have before the Supreme Court took the right to abortion from individuals and returned it to the states. Because "every word, clause, sentence, and provision" is intended to "have effect," it follows that the protection for assisting another to obtain reproductive health care forbids prosecution of something else. *Hyde Park Hous. P'ship*, 850 S.W.2d at 84.

The targets of this provision are laws that subject those assisting others in obtaining reproductive health care to adverse consequences. Texas' infamous Senate Bill 8 law, Tex. Health & Safety Code Ann. § 171.208, for instance, provides a private cause of action for $10,000.00 statutory damages that any person may bring against another who "engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, . . . regardless of whether the person knew or should have known that the abortion would be performed or induced" or merely intends to do so. A proposed Missouri law would go further, making it unlawful to "attempt to aid or abet[] an abortion" by, for example, "[h]osting or maintaining a website or providing internet service that allows Missouri resident to access any website, that encourages or facilitates efforts to obtain elective abortions." D54, at 2. Historically, consequences have not been

limited to assisting another in obtaining an abortion. *In re Fenn*, 128 S.W.2d 657, 668 (Mo. App. 1939) (per curiam) (attorney disbarred for mailing contraceptive).

Prohibiting enforcement of laws that penalize "assisting a person in exercising the right to reproductive freedom" does erase laws that do not target individuals for assisting another but instead proscribe other behavior. The object of the assistance protected is the right to access legally available reproductive health care. It is not probable that courts would interpret this provision as providing carte blanche to violate any law so long as one is assisting somehow another to exercise the right to reproductive freedom. The Secretary's expansive reading of the provision goes well beyond the provision's purpose, as evidenced by the absurd results to which it would lead. Under his view, a person could not rob a bank with impunity by claiming he did so to get money to assist his friend in paying for miscarriage care. It is not probable a court would interpret this section's intent that way. Laws "cannot be interpreted in ways that yield unreasonable or absurd results, and it is assumed that the[ir] . . . enactment . . . is meant to serve the best interests and welfare of the general public." *State v. Nash*, 339 S.W.3d 500, 508 (Mo. banc 2011).

As discussed in § II.C, supra., the initiatives expressly allow regulations needed for the maintenance of patient health. Allowing only physicians to perform an abortion, § 188.080, and requiring them to maintain malpractice insurance, § 188.043.1, are permissible regulations, assuming the state can show they are needed to maintain the health of the patient. The Secretary provides no rationale for concluding that the state will be unable to meet this burden. In any event, the initiative is about making decisions regarding *healthcare*, which necessarily entails the involvement of a healthcare provider.

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Putting a stop to every health-and-safety regulation—including those allowing only physicians to perform abortions and requiring them to maintain malpractice insurance—is not a probable effect of the initiative.

F. A potential effect does not a probable effect make.

The Secretary hedged certain of his outlandish predictions by describing them as potential. As the trial court recognized, potential is not the same as probable.

Adequate summary statements describe *probable* consequences, and a potential effect is not the same. Something is "potential" if it has "the capacity . . . to become or develop into something in the future." *Potential*, New Oxford American Dictionary. In contrast, a thing that is "likely . . . to happen" is probable. *Probable*, New Oxford American Dictionary.

In the first bullet point, the Secretary describes dangerous abortions at any time "without . . . potentially being subject to malpractice." As explained in § II.C, supra., it is not a probable effect of the initiatives that the state law requiring malpractice insurance would be invalid. The Secretary recognizes that, which is why he labels it as potential.

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III. "[N]ullif[ication] [of] longstanding Missouri law" is not a purpose or probable effect of the initiatives because shifting the usual burden in constitutional challenges to regulations or restrictions does not nullify any law so stating otherwise is argumentative, misleading, and likely to confuse voters. (Responds to Point II)

It is argumentative and prejudicial to state that the initiatives will "nullify longstanding Missouri law." In law, a "nullity" is an "act or thing that is legally void." *Nullity*, New Oxford American Dictionary. Laws that are void are "not valid or legally binding;" rather, they are "ineffectual." *Void*, New Oxford American Dictionary. It is not difficult to imagine that among the many Missourians who would like to return to protections enjoyed under *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), are some who would hesitate at the prospect of voiding every Missouri law touching on abortion. Yet the use of "nullify" with "Missouri law" suggests that an entire body of law would be struck upon passage of the initiative. Asserting without qualification that an entire theme of Missouri's "longstanding" law would not be binding is misleading and creates prejudice against the initiative.

Moreover, the initiatives do not nullify longstanding Missouri law because they add to Missouri law and specify no law they would annul. The initiative *adds* to Missouri law by appending a new section to our Bill of Rights. Its prefatory sentence states, "Article I of the Constitution is revised by adopting one new Section to be known as Article I, Section 36." The Secretary's contention that the initiative would nullify the law is a gussied-up version of a Secretary Carnahan summary statement that was rejected by the courts. In *Cures Without Cloning*, the Court held that "voters are likely to be confused

by a ballot title stating that the amendment would 'repeal [existing law]'" where "[t]he introductory language of the initiative states that it will amend the current [law] by 'adding' one new section." 259 S.W.3d at 82. Moreover, the initiative's text does not identify any laws that would be invalidated. Indeed, most of Missouri's current laws were enforced while Missourians still had a federal right to abortion pre-*Dobbs*. The nullification of "longstanding Missouri" law is not a probable effect of the initiatives.

An additional reason the initiative will not nullify longstanding Missouri law is that Constitutional amendments do not nullify laws. *See* § II.A—B, supra.

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IV. So-called "partial birth abortion" is not a probable effect of the initiatives because the passage of the initiatives would not make any such procedure lawful in Missouri so stating otherwise is argumentative, misleading, and likely to confuse voters. (Responds to Points II & VII)

It is misleading for the Secretary to suggest to voters that the initiatives would legalize so-called "partial-birth abortion." Partial-birth abortion is prohibited by federal law. 18 U.S.C. § 1531. "Under the Supremacy Clause, state laws and constitutional provisions are preempted and have no effect to the extent they conflict with federal laws." *Johnson v. State*, 366 S.W.3d 11, 26 (Mo. banc 2012). Thus, even if, *arguendo*, the initiatives would stop Missouri from banning the procedure, they would be preempted.[5]

Moreover, the Secretary also assumes—with no basis provided—that the ban on such a procedure could not be justified as needed to maintain the health of the patient.

Furthermore, according to both the dictionary and Supreme Court, "partial-brith abortion" is a method for late-term abortions. *Gonzales v. Carhart*, 550 U.S. 124, 136 (2007); *Partial-birth abortion*, New Oxford American Dictionary. Under five of the initiatives, all late-term abortions can be prohibited, even if not for patient health reasons, so long as there is a life-and-health exception.

It is argumentative and prejudicial to refer to "partial-birth abortion" in the summary statement. As the League of Women Voters of Missouri has pointed out, the

[5] The federal restriction is not likely to change. The Secretary points out that "because partial-birth abortion is so deeply unpopular, the proponents of [a] sweeping abortion-rights bill felt the need to retain the federal partial-birth abortion ban despite pushing a bill that would jettison nearly every other restriction on abortion in America." App. Br., at 61.

term "partial birth abortion" is graphic and inflammatory political spin, not something medically recognized. Br., at 24.[6] And, as the Secretary states, it is "deeply unpopular." App. Br., at 61. Suggesting that so-called partial-birth abortions in Missouri would be a probable effect of the initiatives is prejudicial.

[6] The League notes,

> Partial birth abortion" is "graphic, inflammatory language" and "is not a medical term . . .." *The American College of Obstetricians and Gynecologists Guide to Language and Abortion* 2 (2022). The term was first coined by the National Right to Life Committee in 1995. Julie Rovner, *'Partial-Birth Abortion': Separating Fact from Spin*, National Public Radio, Feb. 21, 2006, https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin.

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V. The Secretary waived any claim that the trial court erred in finding the phrases "dangerous, unregulated, and unrestricted abortions," "from conception to live birth," "without requiring a medical license," "without . . . potentially being subject to medical malpractice," "nullify longstanding Missouri law," "partial-birth abortion," "including a minor," "end the life," "unborn child," "at any time," or "potentially including tax-payer funding" argumentative by failing to include any claim of error in his opening brief.

"The secretary of state's summary statement must be 'concise' and cannot be 'intentionally argumentative' or 'likely to create prejudice.'" *Brown v. Carnahan*, 370 S.W.3d 637, 654 (Mo. banc 2012) (quoting § 116.334.1, RSMo.). "To create such a summary statement that is not insufficient or unfair, the summary statement must be adequate and state the consequences of the initiative without bias, prejudice, deception, or favoritism." *Id*.

The Secretary does not defend his use of the phrases "dangerous, unregulated, and unrestricted abortions," "from conception to live birth," "without requiring a medical license," "without . . . potentially being subject to medical malpractice," "nullify longstanding Missouri law," "partial-birth abortion," "including a minor," "end the life," "unborn child," "at any time," or "potentially including tax-payer funding" against the claim they are argumentative and prejudicial. "Issues not raised in an appellant's opening brief cannot be raised for the first time in the reply brief and are not properly preserved." *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 784 (Mo. App. W.D. 2008) (cleaned up). *See also Auman v. Richard*, 672 S.W.3d 277, 281 (Mo. App. W.D. 2023) ("an argument that follows a point relied on must provide sufficient analytical support for the claim of reversible error").

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VI. As used by the Secretary, the phrases "dangerous, unregulated, and unrestricted abortions," "from conception to live birth," "without requiring a medical license," "without . . . potentially being subject to medical malpractice," "nullify longstanding Missouri law," "the right to life," "partial-birth abortion," "end the life," "unborn child," and "at any time" are argumentative, as is each statement taken as whole.

As Justice Kavanaugh observed, "[t]he interests on both sides of the abortion issue are extraordinarily weighty." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2304 (2022) (Kavanaugh, J., concurring). He noted that "[o]n the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for women's personal and professional lives, and for women's health" while "[o]n the other side, many pro-life advocates forcefully argue that a fetus is a human life." *Id*.

Rather than providing nonargumentative, nonprejudicial, nonbiased summary statements, the Secretary takes a side in the debate and saturates the statements with moral frames favoring his opinion. Voters are entitled to a summary statement that is not argumentative. *See* § I, supra. The Secretary's use of the phrases "dangerous, unregulated, and unrestricted abortions," "from conception to live birth," "without requiring a medical license," "without . . . potentially being subject to medical malpractice," "nullify longstanding Missouri law," "the right to life," "partial-birth abortion," "including a minor," "end the life," "unborn child," and "at any time" is argumentative and prejudicial. Permeated as they are with biased language, the summary statements are argumentative in their entirety.

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On their face, the summary statements are argumentative in that they demonstrate the Secretary's bias against the initiative and are intended to prejudice voters against the initiatives. Conjecture is not required to glean from the summaries the Secretary's belief that voters should oppose the initiatives. In truth, it would be difficult to devise summaries that are more argumentative than the Secretary's. In this respect, his summary statements are unprecedented and the quintessence of insufficient and unfair.

The Secretary achieves this feat by stringing together tendentious phrases, none of which neutrally describe the initiatives.[7] His brief in this Court is perhaps the best evidence that the phrases are argumentative because it shows the systematic reasoning—albeit misguided—through which the Secretary trots to justify his language. "[U]sing or characterized by systematic reasoning" is one definition of argumentative. *Argumentative*, New Oxford American Dictionary.

Rather than using neutral language, the Secretary filled his summaries with a mix of old and new morality frames designed to spur opposition to abortion. "Framing helps individuals make sense of the world around them by providing a scheme of interpretation that highlights particular aspects for attention while downplaying others.". Laura P. Moyer, et al., *Opposition to Abortion, Then and Now: How Amicus Briefs Use Policy Frames in Abortion Litigation*, *in* Open Judicial Politics 290, 291 (Rorie Spill Solberg & Eric Waltenburg eds, 2d ed., 2023)(ebook). "Early after *Roe v. Wade*, morality frames emphasized the conflict between the fetus and the mother and characterized women who

[7] The summary's exclusive and repeated focus on abortion is also argumentative and likely to cause confusion. *See* § XI, infra.

obtained abortions as morally repugnant." *Id*. Later, abortion was reframed "to emphasize concern for women." *Id*. "This was done for strategic reasons—namely, the belief that taking a more compassionate stance toward women and emphasizing women's rights would be more likely to 'topple the abortion industry.'" *Id*. Various frames were test marketed. *Id*., at 290. "This shift in framing was intended to influence public opinion by targeting those who were unmoved by the emphasis on the unborn but who might be persuaded by concern for the woman." *Id*. at 292.

The Secretary's plea that "dangerous, unregulated, and unrestricted abortions" are a probable effect of the initiatives is argumentative. As exposed in his brief, it is a conclusion he reaches after jumping many hurdles. As discussed, *supra*., his logic crashes. Dangerous, unregulated, unrestricted abortions are not the purpose of the initiatives, as the Secretary implicitly acknowledges by suggesting they are an unintentional effect of Dr. Fitz-James's initiatives. Nor are the initiatives likely to be interpreted to require dangerous, unregulated, and unrestricted abortions. Thus, in the end, the phrase serves only to betray the Secretary's bias and prejudice voters against the initiatives. It is a moral frame designed to send the message that if you care about women, then you will vote against the initiatives.

The Secretary's declarations that abortions would be provided "from conception to live birth" and "at any time" are argumentative. Abortion is not a thing that can happen at conception or at live birth, so neither is a probable effect of the initiatives. Infanticide is universally condemned, so the prospect of abortion "at live birth" would bias voters against the measures. Furthermore, many people support abortion until late in the

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pregnancy. The live-birth frame is intended to cause voters to believe the initiatives are morally repugnant and, therefore, vote against them. Striking "to live birth," however, does not fix the problem because stating abortion would be available "from conception" implies there is no point at which it could be regulated.

For much the same reason, the inclusion of "partial-birth abortion" is argumentative. *See also*, § IV, supra. It is a moral frame, not a neutral description of the procedure the Secretary believes will become available after one of the initiatives passes.

The Secretary's pretense that the initiatives would result in abortions being performed "without requiring a medical license" and "without . . . potentially being subject to medical malpractice" is designed to prejudice those who care about women's health against the initiatives.

The threat that "longstanding Missouri law" would be "nullif[ied]" implies all regulation of abortion would disappear overnight. *See also* § II.D, supra. This framing is intended to alarm those who believe there should be at least *some* regulation around abortion. As the Secretary notes, even reproductive health proponents do not want "unsafe, 'back-alley' abortions from unlicensed individuals." App. Br., at 36. The statement that the measures would "nullify longstanding Missouri law" would create prejudice against them.

Including "the right to life" in the summary statement is argumentative because it frames the abortion as presenting a moral conflict between pregnant persons and their fetuses, requiring voters to take a side. The Secretary's view that there is a moral conflict is not neutral. Voters know what abortion is, and those who believe there is a moral

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conflict do not need him to tell them. Asserting as fact that such a conflict exists is argumentative.

Stating that Dr. Fitz-James's proposals would abrogate the "right to life" is also prejudicial because the phrase alludes to The Declaration of Independence (U.S. 1776), which contains principles to which most Americans aspire. Famously, the Declaration's preamble proclaims that among "self-evident" truths is that "all men" have an "unalienable [r]igtht[]" to [l]ife." *Id*. The Declaration has been put to use as a political frame. "Religious leaders, and especially political activists, refer to the Declaration to support their primarily moral and political arguments against abortion." Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 Penn St. L. Rev. 413, 427–28 (2006). Who is against the Declaration of Independence? As the Secretary frames it, those who would vote for the measures.

"Right to life" is the one phrase for which the Secretary presents an argument that is not argumentative—albeit a meritless one. He posits that it is not argumentative to refer to "right to life" laws because that is what the legislature named them. Here, he is conflating the requirement his language not be misleading with the requirement that it is not argumentative. When the legislature chooses to label a law with a moral frame, it might not be misleading to refer to it using that designation—if in fact it would repeal them. *But See* § II B—D. Nonetheless, there is no authority for the proposition that it excuses the Secretary from his obligation to exclude argumentative language from summary statements.

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Finally, describing the initiative as "guaranteeing the right of any woman . . . to end the life of their unborn child" is argumentative. The Secretary frames a conflict between a woman and a child, a perspective on the morality of abortion. Others have a different view. A child is "a young human being below the age of puberty or below the legal age of majority." *Child*, New Oxford American Dictionary. Children—as "young human being[s]"—have been born, which means "existing because of birth." *Born*, New Oxford American Dictionary. The Secretary is foisting his moral frame upon voters by including it in the summary. It is biased and prejudicial.

The contention that zygotes, blastocysts, embryos, and fetuses collectively and without distinction are "unborn child[ren]" is a contentious viewpoint, not a neutral statement. It is not even an accurate reflection of Missouri law. *See McQueen v. Gadberry*, 507 S.W.3d 127, 147–48 (Mo. App. E.D. 2016) ("the trial court did not err in failing to classify the frozen pre-embryos as children"). The bottom line is that when human life begins is the topic of philosophical, moral, and political debate; the Secretary's conclusion takes sides in the debate and is not a neutral statement of the initiatives' probable effects.

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VII. The potential for taxpayer funding for abortion is not a probable effect of the initiatives that are silent about taxpayer funding because it would not change the current Constitution, which is likewise silent on the issue. (Responds to Point IV)

Under the Constitution, as it exists today, nothing prohibits the legislature from allocating taxpayer funds for abortion care. Under the Constitution as it would exist after passage of the initiatives that say nothing about the subject—Initiatives 2024-078, 2024-080, 2024-082, and 2024-086—nothing would prohibit the legislature from appropriating taxpayer funds for abortion care. There is no change.

The Secretary indulges his twin assumptions that the current Constitution could not be interpreted to require the government to pay for abortion care but that the initiatives' silence would cause them to be interpreted as requiring it to do so. Neither is supported by authority. To the contrary, this Court must harmonize the initiative with Mo. Const. art. III, § 51, which states, "[t]he initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby," rather than create an irreconcilable conflict. *See Cady v. Ashcroft*, 606 S.W.3d 659, 665 (Mo. App. W.D. 2020) (citing *Comm. For A Healthy Future, Inc. v Carnahan*, 201 S.W.3d 503, 510 (Mo. banc 2006)). As in *Cady*, "there is nothing on the face of the [Proposed Measure] that clearly and unavoidably purports to appropriate previously existing funds." *Id.*, at 668.

The Secretary also misrepresents that Dr. Fitz-James "conceded" that the initiatives could require taxpayer funding by making this point. She merely acknowledged that the legislature *currently* has the option to fund abortions, and her

measures do not say they would take that option from the legislature. Such use of taxpayer funds would be the effect of legislative action, not Dr. Fitz-James' measures.

In an instance of relative modesty, the Secretary states that taxpayer-funded abortion is merely a potential effect of the initiatives. *See* § II.F. Even so, "potentially" oversells the strength of his argument.

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VIII. The potential for taxpayer funding for abortion is not a probable effect of the initiatives that state they do not "require[] government funding of abortion procedures" because the probable effect is that government funding would not be required. (Point IV).

Astonishingly, the Secretary persists in insisting that there is a potential that the two initiatives that state "[n]othing in this section requires government funding of abortion procedures" – Initiatives 2024-085 and 2024-087—might result in taxpayer funded abortion and such funding is a probable effect of the initiatives.

"The primary rule is to give effect to the intent of the voters who adopted the provision by considering the plain and ordinary meaning of the words used." *Pearson v. Koster*, 367 S.W.3d 36, 48 (Mo. banc 2012). Courts "assume[] that every word in the constitutional provision has effect and meaning." *Pearson*, 367 S.W.3d at 48.

These initiatives could not be plainer: they do not require government funds to pay for abortions. It is disingenuous for the Secretary to suggest contrarily that government funding is a probable effect by including it in his summaries.

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IX. The Secretary's bullet point about the probable effect of the initiatives on minors' decision making about abortion is argumentative and does not state the purpose or probable effect of the initiatives that authorize the legislature to enact a parental-consent requirement with a bypass procedure. (Points I & III)

In general, in Missouri, an abortion cannot be performed on a patient under the age of 18 without the informed written consent of one parent or guardian and that parent or guardian notifying any other custodial parent in writing. § 188.028.1(1), RSMo. A minor may bypass this requirement by obtaining a court order granting the right to self-consent or judicial consent. §§ 188.028.1(3), 188.028.2(3). At a hearing,

> the court shall hear evidence relating to the emotional development, maturity, intellect and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the minor should be granted majority rights for the purpose of consenting to the abortion or whether the abortion is in the best interests of the minor.

§ 188.028.2(2), RSMo.

The Secretary does not include language about minors in the summary statements for the initiatives that say nothing about minors—Initiatives 2024-078, 2024-082, 2024-086, 2024-087—presumably believing that disturbing the current law is neither a purpose nor probable effect of the measures.

The Secretary's summaries reflect a different conclusion about the initiatives that include the explicit parental-consent clause—Initiatives 2024-085 and 2024-080. The

parental-consent clause has the purpose and probable effect of retaining parental consent but having decisions about a patient's capacity to give informed consent made by a healthcare professional—who is in the daily business of determining capacity to give informed consent—rather than a juvenile court judge.

From this change, the Secretary concludes these initiatives "guarantee[] the right of any woman, including a minor, to end the life of their unborn child at any time." His contention is argumentative and contrary to the purpose and probable effect of the initiatives. In support, he relies on his conclusion that the bypass is so "capacious" to be meaningless. Provisions are not construed in a manner that renders them superfluous. Moreover, the Secretary provides no explanation for his theory that healthcare professionals are more likely to find parental consent can be bypassed than a judge would be. Indeed, healthcare professionals are bound by standards for obtaining informed consent. *See Wilkerson v. Mid-Am. Cardiology*, 908 S.W.2d 691, 696 (Mo. App. W.D. 1995) (element of cause of action for lack of informed consent). Judges are not. § 188.028.2(2), RSMo. (allowing consideration of "any other evidence the court may find useful"). Moreover, healthcare professionals must act in good faith. D37, at 2. This a standard that Missouri law currently uses in the abortion context. § 188.039.1, RSMo.

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X. The inability of local governments to tax and regulate abortions is not a purpose or probable effect of the initiatives because they already lack the authority to tax or regulate medical procedures. (Point V)

The Secretary complains that the trial court did not believe that the initiatives would have the effect of prohibiting local governments from taxing and regulating abortions. In the trial court and again in this Court, the Secretary points to no existing authority that the initiatives would restrain. Abortion is a medical procedure, a field which is regulated by the state government. Moreover, medical procedures are not subject to local sales taxes. Furthermore, abortion medications are exempted from local sales tax. § 144.030.2(18) RSMo. The inability of local governments to regulate and tax abortion is not a probable effect of the initiatives.

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XI. The Secretary's failure to mention anything other than abortion is argumentative, likely to cause voter confusion, and fails to fairly describe the scope of the initiatives. (Responds to Point VI)

On their faces, the initiatives create a right to reproductive freedom defined as "the right to make and carry out decisions about all matters relating to reproductive health care, including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions." Nevertheless, a reader of the Secretary's summary statements could be forgiven for concluding that the right created by the initiative comprises nothing more than abortion care because it is the only aspect the Secretary mentions.

The Secretary's overemphasis on abortion is argumentative. *See Rogers v. Bond*, 839 S.W.2d 292, 294 (Mo. banc 1992) (holding that submission of more than one instruction on a single element "overemphasizes one particular aspect of the plaintiffs' case and, in this sense, it is argumentative").

Moreover, the summary statements' omissions make the summary statement misleading. *See Seay v. Jones*, 439 S.W.3d 881, 892 (Mo. App. W.D. 2014) (holding that omission of funding contingency for advance voting caused the summary statement to be misleading).

As Dr. Fitz-James showed in the trial court, abortion is not the only reproductive health care at risk in Missouri. D20, at 9-11. Efforts are afoot to interfere with the ability to make decisions about contraceptive care in particular. *Id*.

The failure to mention anything other than abortion will cause voter confusion. An initiative could be proposed to safeguard abortion access only, but Dr. Fitz-James's

initiative are not so limited. A similar proposal in Arizona is limited to abortion. D26, at 2-3. Indeed, Dr. Fitz-James's initiative could share the Missouri ballot with another proposal that covers abortion only. *See* D68, at 2. Because the Secretary's summary statement fails to account for the difference in the initiatives' scope compared to other initiatives, it will cause confusion and deprive Missourians of the opportunity to make an informed choice about the initiatives.

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XII. The trial court was required to write different summary statements. (Responds to Point VII)

The Secretary took his shot at writing summary statements and wantonly discarded any pretense of impartiality. Faced with deceptive and argumentative summary statements, the trial court was required to provide correct ones.

A. The Secretary left little to salvage.

It is difficult to overstate the degree to which the Secretary saturated the statements with misleading, argumentative, and unfair wording. The Secretary's statement for Initiative 2024-085, for example, stripped of that language, would be sparse:

> Do you want to amend the Missouri Constitution to:
>
> - allow for ~~dangerous, unregulated, and unrestricted~~ abortions~~, from conception to live birth, without requiring a medical license or potentially being subject to medical malpractice~~;
>
> - ~~nullify longstanding Missouri law~~ protecting ~~the right to life,~~ including but not limited to ~~partial-birth abortion~~;
>
> - allow for laws to be enacted regulating abortion procedures after Fetal Viability, while guaranteeing the right of any woman~~, including a minor,~~ to ~~end the life of their unborn child at any time~~; and
>
> - require the government not to discriminate against persons providing or obtaining an abortion, ~~potentially including tax-payer funding~~?

D25, at 4 (strikeouts added).

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B. The Secretary has waived this issue by failing to provide any guidance in the trial court or in his opening brief.

The Secretary decided to shoot his shot in court by defending his summary statements without providing the trial court with any argument about what should be done if the statements were found insufficient or unfair. On appeal, he asserts, "the trial court should have addressed any perceived insufficiencies by making the smallest changes possible within the existing language supplied by the Secretary," App. Br., at 54, but—even now knowing what language was found inadequate and unfair—he does not present any argument about how his summary statements could be revised. The statute required the trial court to produce sufficient and fair summary statements. The Secretary has forfeited the opportunity to offer alternative language.

C. Cases suggesting the trial court owes deference to the Secretary were wrongly decided.

Dr. Fitz-James acknowledges this Court has held that courts are "not authorized to re-write entire summary statements," *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 83 (Mo. App. W.D. 2008); however, this holding should be reconsidered because it is inconsistent with the text and intent of § 116.190, RSMo.

Section 116.190 requires the trial court certify a sufficient and fair summary statement where the Secretary does not provide one. *Missourians to Protect the Initiative Process*, 799 S.W.2d at 829 ("the court is authorized to do no more than certify a correct ballot title"). This requires determining whether the Secretary's statement is fair and adequate and certify a correct summary statement if it is not. Consideration of the ballot title is the "limited function" that courts play—limited as opposed to considering also the

constitutionality of a proposed initiative, for instance. *Prentzler v. Carnahan*, 366 S.W.3d 557, 562 (Mo. App. W.D. 2012). There is no basis in the text for finding the courts' authority further limited within this limit. The statute provides only that at the conclusion of litigation, there be a sufficient ballot title.

Nothing in the statute calls for deference to the Secretary once it is determined his summary statement is unfair. Where courts owe deference to executive branch findings, statutes say so. *See, e.g.*, § 536.140.2(3), (6), (7) (requiring deference to agency unless decision "[i]s unsupported by competent and substantial evidence upon the whole record," "[i]s arbitrary, capricious or unreasonable," or "[i]nvolves an abuse of discretion"). Section 116.190 has no such limitation.

Even where deference is owed to an agency decision, court review is de novo when a case "involves only the application by the agency of the law to the facts." § 536.140.3, RSMo. At its essence, a summary statement answers a legal question: given the fact of the text of the proposed initiative, what is its purpose and probable effect? The Secretary has no specialized knowledge about how the initiative will be construed.

The legislature delegated authority to write a summary statement to the judicial branch on the same terms as to the executive branch. There is no separation of powers conflict where the legislature has delegated to its co-equal branches on identical terms. By providing the courts with the authority to write "a correct ballot title," *Missourians to Protect the Initiative Process*, 799 S.W.2d at 829, "the legislature apparently weighed the interests of the citizenry in getting ballot initiatives on the ballot in a timely fashion against the interests of those opposing the language to be utilized on the official ballot

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title." *Overfelt v. McCaskill*, 81 S.W.3d 732, 737 n.3 (Mo. App. W.D. 2002) (superseded in part by statute), *holding modified by Seay v. Jones*, 439 S.W.3d 881 (Mo. App. W.D. 2014).

The court is required to write a correct title, not merely tinker with the remains of the Secretary's failed effort to do so. The language of the statute and *Missourians to Protect the Initiative Process* call for a correct title, not a corrected version of the Secretary's. *Compare Missourians to Protect the Initiative Process*, 799 S.W.2d at 829 ("the court is authorized to . . . certify a correct ballot title") *with Reeves v. Kander*, 462 S.W.3d 853, 858 (Mo. App. W.D. 2015) ("Section 116.190 allows the trial court to correct any insufficient or unfair language of the ballot title and certify the corrected official ballot title to the secretary of state") (cleaned up).

D. This case is distinguishable from those requiring only limited re-writing.

It is not necessary to decide whether the authority to provide a correct ballot title is limited by deference to the Secretary's draft in this case because the Secretary did not confine his insufficient and unfair description of the initiative to a particular portion of the summary statement. Each bullet point of each summary statement for each initiative contains language that is argumentative, misleading, or likely to confuse voters. This is not how Secretaries have usually carried out their function, but a duty of neutrality did not restrain the Secretary when it came to these initiatives. There was no way for the trial court to meet its obligation to certify a correct summary statement without making

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significant changes to the Secretary's work—as the Secretary implicitly acknowledges by providing no examples of how the trial court could have done otherwise.

Voters are entitled to a *correct* summary statement—or at least a *corrected* version of the Secretary's. The Secretary explains at length the meaning of "modify," but "modify" is not the same as "correct." "Correct" means "free from error" as an adjective—the way it is used by *Missourians to Protect the Initiative Process*—or to "put right" when used as a participle, as in *Reeves*. *Correct*, New Oxford American Dictionary. Regardless of which usage is correct under the statute, getting there from the Secretary's summary statement requires more than a minor tweak.

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XIII. The summary statements certified by the trial court are fair and adequate. (Responds to Point VII)

The summary statements certified by the trial court are fair and adequate in that they describe the purpose and probable effects of the initiatives. The Secretary's quibbles lack merit.

The Secretary questions the trial court, suggesting it improperly "defer[red] to [Dr. Fitz-James]." Yes, the trial court entered judgment in her favor. But it did not defer to her, crafting correct summary statements that are different than those she proposed in her petitions. In fact, she did not even ask the court to defer to her. *See* Tr., at 54-55 (counsel stating "I agree . . . proponents shouldn't be writing summary statements, . . . [b]ut neither should opponents and that is what happened here").

The Secretary objects to the statement that the initiatives would "remove Missouri's ban on abortions."[8] He insists that Missouri does not ban all abortions because it allows doctors who perform an abortion an affirmative defense—albeit with the burden of persuasion—in any subsequent criminal prosecution. § 188.017.3, RSMo.[9] The parties can agree to disagree on whether that suffices to make abortion available even in the direst circumstances. For the trial court's summary does not say that Missouri has banned

[8] The trial court borrowed the phrase "remove" from the Secretary's previous work.

[9] The Secretary takes umbrage with the word "ban" because, he says, Missouri has an exception for emergencies. Yet he himself uses the phrase "partial-birth abortion ban" to refer to a federal law that likewise has an emergency exception. App. Br., at 61. Voters will not be confused by the corrected summary statement.

all abortions, just that those Missouri did ban would no longer be banned. That is an accurate description of the purpose and probable effects of the initiatives.[10]

Next, the Secretary says that the corrected summary statements are misleading because they do not state that the initiatives "would 'remove Missouri's laws on abortion.'" App. Br., at 60. But part of what is misleading about the Secretary's summaries is that they insist the initiatives will result in all laws touching on abortion being invalid. *See* § II, supra. A corrected ballot title should not include the same errors as the Secretary's.

The Secretary reserves especially strong distain for the trial court's exclusion of his alarmist claims about "partial-birth abortion" from the corrected summary statement. The phrase is both argumentative and misleading in that so-called partial-birth abortions are not a probable effect of the initiatives. *See* §§ IV, VI.

Finally, the Secretary disagrees with the inclusion of the phrase "reproductive health care" in place of abortion. App. Br. 63-64. However, this is a strawman argument that misrepresents the corrected summary statements. They articulate the purpose and probable effect of the amendments to safeguard the right to make decisions about "reproductive health care, *including abortion* and contraceptives." D77, at 4. In other words, they include the words "reproductive health care" in addition to abortion, not as a

[10] The Secretary suggests that "abortions" should be modified here by "elective." Dr. Fitz-James does not object to a modifier, but "elective abortion" is dated terminology, which could confuse voters; today one would refer to induced and medication abortions. Reference to induced and medication abortions is also more descriptive than "elective."

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substitute. Explicitly mentioning abortion does not hide the fact that abortion is one type of health care implicated by the initiatives. Moreover, while the Secretary complains of "repeated" use of the phrase, it is used twice—the second time to describe what types of care can be regulated to improve and maintain the health of the patient. *Id*. By comparison, the Secretary used "abortion" four times in every one of his summary statements. D25, at 1-6. This properly describes the regulation permitted for *all* reproductive health care, not abortion only; thus, it would be misleading to suggest that only abortion could be regulated for patient health and safety.

At bottom, the Secretary's arguments against the corrected summary statements reflect that he believes there are better ways the trial court could write a fair summary statement, but that is not the test. "If charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions." *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008). The legislature charged the trial court with certifying a correct summary statement after the Secretary failed to. Whether the corrected summary statement "is the best language for describing the initiative is not the test." *Id*. (cleaned up). "The important test is whether the language fairly and impartially summarizes the purposes of the initiative." *Id*. (cleaned up). The corrected summary statements clear this bar.

XIV. Remand of this case is unnecessary and would cause more delay because this Court may enter the judgment the trial court should have. (Responds to Point VII)

Remand of this case would serve no purpose and cause delay.

This case was tried on stipulated evidence, so review in de novo. *Pippens v. Ashcroft*, 606 S.W.3d 689, 700—01 (Mo. App. W.D. 2020). Additionally, this Court can affirm for any reason supported by the record. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003) ("This Court is primarily concerned with the correctness of the result, not the route taken by the trial court to reach it; the trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground").

In addition, Rule 84.14 authorizes this Court to "give such judgment as the court ought to give" and instructs that "[u]nless justice otherwise requires, th[is] [C]ourt shall dispose finally of the case." Exercise of that authority is appropriate under the present circumstances. *See*, *ACLU of Missouri v. Ashcroft*, 577 S.W.3d 881, 899 n.20 (Mo. App. W.D. 2019).

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XV. Argument that does not follow a point relied on to which it relates should be disregarded. (Responds to "Introduction and Summary of Argument" & argument preceding restatement of first point relied on)

In Missouri appellate courts, argument follows the restatement of the point relied on that the argument discusses and is limited to the errors included in the point. Mo. Sup. Ct. R. 84.04(e). The Secretary inserts a five-page opening argument untethered to any point. App. Br., at 10-14. He also includes a pre-argument argument before the restatement of his first point relied on. *Id*., at 27-28. It appears less like it is designed for a jury but, nonetheless, is not tied to a point. These arguments should be disregarded. *Fowler v. Missouri Sheriffs' Ret. Sys.*, 623 S.W.3d 578, 583 (Mo. banc 2021) ("Rule 84.04's requirements are mandatory").

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CONCLUSION

The trial court correctly determined that the Secretary's summary statements were argumentative, insufficient, and unfair. In their place, the court certified correct summary statements that are sufficient and fair.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 12,663 words; is in compliance with Missouri Supreme Court Rule 84.06(b) and Missouri Court of Appeals, Western District Rule 41; and includes the information required by Rule 55.03.

/s/ Anthony E. Rothert

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CERTIFICATE OF SERVICE

I hereby certify that, on October 18, 2023, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties.

/s/ Anthony E. Rothert